**THE KULIM BALING ROAD TRANSPORT CO SDN BHD & ANOR**

**v.**

**THANIMALAI MUNIAN & ANOR**

HIGH COURT MALAYA, ALOR STAR
ZAMANI A RAHIM JC
[CIVIL APPEAL NO: 12-76-2004]
29 JULY 2008

***CIVIL PROCEDURE:*** *Appeal - Interference by appellate court - Questions of fact and credibility - Whether appellate court should be slow to interfere*

***EVIDENCE:*** *Appeal - Finding of fact - Whether appellate intervention warranted*

***TORT:*** *Road accident - Liability - Collision from the rear - Whether on a 50:50 basis*

The appellants appealed against the Sessions Court's apportionment of 50:50 liability in a running down action. The accident involved a collision by a motorcycle into the rear of a bus owned by the first respondent and driven by the second respondent, resulting in the death of the motorcyclist and bodily injuries to his pillion-rider. The estate of the deceased motorcyclist and his pillion-rider had also cross-appealed against the Sessions Court's findings.

**Held (dismissing the appeal):**

**(1)** The Sessions Court judge, having considered the evidence as a whole, had acted on the second appellant's evidence. This concerned a question of fact and credibility of the second respondent. The High Court, as an appellate court, had to be slow to interfere with the observation on credibility of a witness which it did not have the advantage of seeing and hearing. *Norata Singh v. Sedara Singh* (refd). (para 11)

**(2)** The High Court would confirm the decision of the Sessions Court judge that the liability of the parties be apportioned on a 50:50 basis. (paras 21 & 22)

**Case(s) referred to:**

*Dewaramah Ellapin Widow and Beneficiary of Subramaniam Kaliappan v. Ibrahim Abdul Hamid & Anor [1989] 1 CLJ 18; [1989] 1 CLJ (Rep) 505 HC* ***(refd)***

*Norata Singh v. Sedara Singh [1967] 1 MLJ 265* ***(refd)***

*Ong Kim Hai v. Kusaini Surip [1984] 2 MLJ 285* ***(refd)***

*Tabarani Mohd Arshad & Anor v. Chan Tenn Yen [1999] 3 CLJ 188 HC* ***(refd)***

*For the appellants/plaintiffs - M/s Ajmer Sandher & Ong*
*For the respondents/defendants - M/s Balabedha & Co*

*Reported by Andrew Christopher Simon*

## JUDGMENT

**Zamani A Rahim JC:**

**[1]** This is an appeal by a registered owner of motorbus no. KY 4533, the first appellant and his driver, the second appellant, who were dissatisfied with the decision of the learned Sessions Court judge who apportioned the liability equally at 50:50 in respect of a running down action.

**[2]** The appeal by the appellants were against liability only.

**[3]** There was a cross appeal *vide* Civil Appeal No: 12-77-2004 by the estate of the deceased, the rider of motorcycle PDP 9021, the first respondent and the pillion rider, the second respondent. I have dismissed the cross appeal with costs. There is no further appeal by the estate of the first respondent and the second respondent.

**[4]** In the present appeal by the first appellant and second appellant, I too dismissed their appeal and confirmed the decision of the learned Sessions Court judge.

**[5]** The accident happened at Jalan Kulim-Serdang at the junction of Kampung Padang Kulim on 17 February 1999 at about 5.15pm. The first respondent who riding motorcycle PDP 9021 from Taman Emas forward Simpang Tiga Lampu Isyarat, Jalan Sungai Ular Hai-Tech, Kulim (see the sketch plan).

**[6]** Upon arrival at the scene of the accident, the second respondent saw a stationary motorbus at a distance of 15 metres on the left edge of the road. The left half of the motorbus body was on the left shoulder of the road and the otherhalf was on the road. The head of motorbus was facing Simpang Tiga Lampu Isyarat, Jalan Sungai Ular Hai-Tech, Kulim. When the motorcycle, PDP 9021 in which the second respondent was riding pillion was about five metres from the rear of the motorbus, suddenly the motorbus turned or moved to the right without activating right trafficator light. On seeing this, the first respondent became panic. The first respondent attempted to brake and avoided to the right. His evasive action failed. He collided into the rear off-side red light indicator (red light indicator on the right side at the rear).

**[7]** At that time, it was drizzling. The traffic was heavy. The first respondent was riding the motorcycle about 3 to 4 feet away from the left edge of the road at a speed approximately 40-50 kmj.

**[8]** The second appellant said that the motorbus stopped there because there were passengers getting down and getting up the motorbus. He claimed that the place he stopped was a bus stop, though the investigating officer said it was not. There were other buses there. There were continous double white line in the middle of the road. Further the second appellant said that after the passengers got into his motorbus, he heard a certain sound came from the rear of his motorbus. He got down and proceeded to the rear of his motorbus. There, the second appellant saw a motorcycle fallen underneath the motorbus at the rear.

**[9]** The second appellant gave the impression that he gave a signal when he wanted to move to the right. In cross examination (at p. 44 & 45 of the appeal record), the second appellant evidence went like this:

> Katakan Encik tidak pasang lampu signal bila nak masuk naik ke jalan.
>
> - Tak setuju.
>
> Encik tak nyata dalam laporan telah pasang signal?
>
> - Polis tak tanya saya.

**[10]** From the available evidence, both oral and mute, the second appellant cannot completely be absolved from liability. He is partly to be responsible for the accident. If the second appellant intended to move onto the right, after having stopped at the left edge of the road, the second appellant must ensure it was safe to do so. Though the second appellant said that he gave the signal to turn right, no mention was made in his police report.

**[11]** By merely giving the signal, it is not sufficient. More so the second appellant was driving a public transport where public safety was utmost importance. The road was busy. There was no evidence from the second appellant whether he had seen the first respondent on his motorcycle coming from the rear before the accident. The appellant's counsel argued that the failure by the second appellant to ascertain the presence of the first respondent at the rear was a non-issue as the motorbus was stationary in a straight position. The second appellant had made no attempt to move to the right. In this aspect of the evidence, it would appear that the learned Session Court judge had accepted the evidence of the second respondent that the motorbus had made a sudden turn to the right. This is a question of fact and credibility of the second respondent. The learned Session Court judge, having considered the evidence as a whole, had acted on the second respondent's evidence. This court, as an appellate court, must be slow to interfere with an observation on credibility of a witness which this court does not have the advantage of seeing and hearing them: see *Norata Singh v. Sedara Singh* [1967] 1 MLJ 265.

**[12]** Be that as it may, the first respondent is equally to be blamed of the accident. He was partly the author of his death. The first respondent should have a proper look out for vehicles travelling in front having regard to the traffic which was heavy at that time and it was drizzling too.

**[13]** If the first appellant made a sudden turn to the right, there is no reason for the first respondent to make a similar turn to the right. The first respondent should have maintained on the left side of the road, reduced the speed when he saw the public transport was loading and unloading passengers. The fact that he had no sufficient time to avoid the motorbus showed that he was travelling quite close to the rear of the motorbus.

**[14]** There are a number of past decisions relating to collision from the rear. Their facts of how the accident happened are not exactly the same with the facts in this case. But these cases may be referred to as guidance to assist in the determination of liability, whether a 100% negligence or there is contributory negligence. In *Dewaramah a/p Ellapin Widow and Beneficiary of Subramaniam a/l Kaliappan v. Ibrahim bin Abdul Hamid and Anor* [1989] 1 CLJ 18; [1989] 1 CLJ (Rep) 505, the plaintiff filed the action for the benefit of the estate of the deceased, the rider of a motorcycle. The deceased rider collided into a motor lorry driven the first defendant. The plaintiff alleged that the accident was caused solely by the negligence of the first defendant. The most serious particulars of negligence was that the first defendant made a sudden turn to his right without giving any warning despite the fact that the deceased rider had given warning of his intention to overtake the motor lorry, driven by the first defendant.

**[15]** The crux of the defence was that the deceased rider was riding his motorcycle too close to the said motor lorry and that he had failed to take heed of the signal given by the first defendant which was indicative of his intention to turn to the right.

It was held as follows:

1. The deceased rider was totally at fault as it was due to his negligence that the accident occurred;

2. The court cannot find anything to fault the first defendant as he had done all could and had observed the essential rule of the road; and

3. In the circumtances, the plaintiff's claim was dismissed with costs.

**[16]** In *Tabarani Mohd. Arshad & Anor v. Chan Tenn Yen* [1999] 3 CLJ 188, an accident occurred between the motorcyclist, ridden by the respondent and motor lorry, driven by the first appellant. The version of the first appellant went like this. He gave light signals five street light away before turning to the right. He looked to the side mirror and found that there was no vehicle behind him and he then turned to the right. While he was negotiating the turning to the right intending to enter the side road, the motorcycle ridden by the respondent came from the rear and collided into the front right tyre of the motor lorry.

**[17]** On appeal the liability was apportioned as follows. The first appellant was 25% liable while the respondent was 75% liable.

**[18]** In the Federal Court case of *Ong Kim Hai v. Kusaini bin Surip* [1984] 2 MLJ 285, an accident occurred between two motorcycles near a junction at the 18th milestone Kuala Lumpur/ Rawang main road. The two motorcycles were travelling in the same direction, that is, from Kuala Lumpur towards Rawang. The respondent travelling behind the appellant.

**[19]** At the trial in the court below, the respondent alleged that the appellant suddenly swerved to the right. The trial judge held that the appellant was wholly to blame for the accident and absolved the respondent from any blame whatsoever and accordingly dismissed the action with costs.

**[20]** In setting aside the finding of 100% liability on the part of the appellant by the trial judge, the Federal Court said the respondent could not be wholly absolved from blame but must took a certain share of the blame and in the circumtances the blame should be apportioned 75% as the appellant's share and 25% as the respondent share.

**[21]** Guided by the aforementioned cases, there can be no 100% liability on either side, except the case of *Dewaramah a/p Ellapin (supra)*. Invariably the liability will be apportioned between the parties. There is no suggestion by the appellant counsel on the apportionment of liability, let alone its proportion. The learned Sessions Court judge found both the first appellant and the first respondent were equally to be blamed for the collision. The liability was at 50:50.

**[22]** Having regard to the circumtances of the accident in this case, I, hereby, confirmed the decision of the learned Sessions Court judge that the liability of the parties be apportioned equally, that is, 50:50.